

**IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON - DIVISION TWO**

LINSKY, INC,

Appellant,
vs.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Respondent.

Thurston County Superior Court
No. 10-2-01426-5

CA No. 42389-8-II

APPELLANT'S REPLY BRIEF

**Appeal from the judgment and order of the
Thurston County Superior Court;
Honorable Thomas McPhee, Judge.**

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I. INTRODUCTION

Since 1933, the State legislature has prevented a licensee from *selling* or *serving* an apparently intoxicated person. For sixty-one years, the statute, the case law, and the Washington State Liquor Control Board's regulations agreed—a licensee was liable for sale and service only. In 1994, the Board amended its regulation to bring it into conflict with RCW 66.44.200 by holding a licensee responsible for permitting an apparently intoxicated person to “physically possess” liquor on the premises. Any doubt of that conflict was removed in 1998 when the Legislature amended RCW 66.44.200 making it clear that the apparently intoxicated person was to bear the punishment for possessing or consuming alcohol while in that apparently intoxicated state. The Board's regulation, WAC 314-16-150 is in excess of its statutory authority, and should be ruled invalid.

II. ARGUMENT

A. WAC 314-16-150(2) is invalid by virtue of the fact that it was amended in contravention of RCW 66.44.200.

While Plaintiff concedes that as a general principle, the Washington State Liquor Control Board (“WSLCB”) has broad power to make regulations, RCW 66.08.030, its authority is limited to that which is expressly granted by statute or necessarily implied

therein. *McGuire v. State*, 58 Wn.App. 195, 198, 791 P.2d 929 (1990). A regulation is a nullity if it is inconsistent with a statute or the legislature's intent. *Winans v. W.A.S., Inc.*, 52 Wn.App. 89, 93, 758 P.2d 503 (1988). Agencies are creatures of law and are required to promulgate regulations pursuant to the statute or statutes authorizing them. *Hoffmann v. Regence Blue Shield*, 140 Wn.2d 121, 125, 991 P.2d 77 (2000).

In the present case, RCW 66.44.200 has existed as part of the WSLCB's enabling legislation since 1933, Respondent's Brief at p. 9, citing Laws of 1933 Ex. Sess., ch. 62 § 36, p.93; and provided simply that "No person shall sell any liquor to any person apparently under the influence of liquor." And while the statutory prohibition against selling to an apparently intoxicated person has not changed since 1933, the Board took it upon itself to amend its original regulation to prohibit physical "possession," 1994 a duty not imposed upon liquor licensees by statute.

B. The Board's Overly Broad Interpretation of "Sale" and "Sell" is Erroneous, and Contrary to Established Case Law and Legislative Intent.

The Board attempts to justify its regulatory overreach by relying upon the 1933 statutory definition contained in RCW 66.04.010(38) for the proposition that “Sale” or “sell” contemplations any possible means by which an apparently intoxicated person might acquire liquor within a licensed premise, including situations where such a person physically possesses or consumes liquor without having purchased it. There are several reasons why the word “sell” does not mean “allow to possess” or “allow to consume.” First, the definition of “sell” is limited by the words “by and person to any person”:

“Sale” and “sell” include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, **by any person to any person**; and also include a sale or selling within the state to a foreign consignee or his agent in the state. “Sale” and “sell” shall not include the giving, at no charge, of a reasonable amount of liquor by a person not licensed by the board to a person not licensed by the board, for personal use only.

RCW 66.04.010(38)(emphasis added).

The words “by any person to any person” indicate a legislative intent that the transaction must be between the seller and

the consumer. In other words, the seller must deliver or transfer the liquor to the consumer. The definition of “sale” is thus limited to transactions between a licensee and its customer; the licensee cannot sell or serve an apparently intoxicated person. But a licensee at Safeco Field cannot and should not be cited for selling two beers to a sober person at a Mariners game, who subsequently returns to his seat and gives one to an apparently intoxicated person.

This limitation on the word “sale” is fortified by a later sentence in the definition: “‘Sale’ and ‘sell’ shall not include the giving, at no charge, or a reasonable amount of liquor by a person not licensed by the board to a person not licensed by the board, for personal use only.” The legislature limited the responsibility of licensees to sales or service when the licensee has the opportunity to observe the person ordering the alcohol and decline service. Put differently, to prosecute the licensee, the Board must provide evidence of the prohibited act, which is the sale or exchange. It is not enough that a licensee sold to a consumer (an unlicensed person) who walked to a different part of the bar (or baseball stadium) and gave it to a friend (another unlicensed person).

This is entirely consistent with fifty years of social host case law which has arisen since the Washington State legislature repealed the “Dram Shop Act” affecting taverns’ responsibility for furnishing alcohol. Since its repeal, the Washington State Supreme Court has adopted the common law rule that commercial hosts are not liable for overserving patrons, or for torts committed by patrons who consume alcohol. See *Estate of Kelly v. Falin*, 127 Wn.2d 31, 36, 896 P.2d 1245 (1995), citing *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 762, 458 P.2d 897 (1969). The Court recognizes limited exceptions to this rule: 1) when a commercial host furnishes a minor with alcohol, it may be sued for injuries resulting from the minors’ intoxication, and 2) a commercial host who serves alcohol to an apparently intoxicated person may be liable if that patron then injures or kills an innocent third party bystander. *Estate of Kelly*, 127 Wn.2d at 36-37.

In these cases, the commercial host’s standard of liability has been established through reference to RCW 66.44.200(1), which provides “No person shall sell any liquor to any person under the

influence of liquor.” The Washington State Supreme Court has interpreted the “sell” more narrowly than the Board now urges—under RCW 66.44.200(1), whether or not someone is apparently intoxicated “is to be judged by that person’s *appearance* at the time the intoxicating liquor is furnished to the person.” *Christen v. Lee*, 113 Wn.2d 478, 488, 780 P.2d 1307 (1989) (quoting *Purchase v. Meyer*, 108 Wn.2d 220, 233, 737 P.2d 661 (1987) (emphasis in *Christen*). Under this liability theory, based on RCW 66.44.200(1), a commercial host must have actual notice of a patron’s intoxication in order for an injured bystander to allege negligence. *Estate of Kelly*, 127 Wn.2d at 37 (citing *Shelby v. Keck*, 85 Wn.2d 911, 914-17, 541 P.2d 365 (1975)). Where there is no evidence that a patron appears intoxicated when served, courts have found summary judgment appropriate in favor of the commercial host. *Christen*, 113 Wn.2d at 490.

Further, in interpreting RCW 66.44.200(1), the Washington Supreme Court emphasized the need for a licensee’s actual notice of apparent intoxication to establish third-party liability. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 273, 96 P.3d 386 (2004).

According to the Court, “unlike the determination of something obvious, determination of something apparent¹ requires at least some reflection and thought. *Id.* at 268. “Apparent” is defined as readily apparently intoxicated person.

Washington courts have been consistent—to establish third-party, or “commercial host” liability, a licensee must have negligently violated RCW 66.44.200(1), by selling or serving a person who could be observed to be apparently intoxicated *at the time of sale and service*. And this is correct-- the legislature limited the responsibility of licensees to sales or service when the licensee has the opportunity to observe the person ordering the alcohol and decline service. To accept the Board’s argument, that “sale” and “sell” can mean any possession of any liquor inside a licensed establishment, at any time, upends the entire area of commercial host liability, overturns fifty years of case law, and ignores the proper interpretation and limitations set forth by the legislature in RCW 66.44.200.

¹ “Apparent” is defined as “readily perceptible to the senses” and “capable of being readily perceived by the sensibilities or understanding as certainly existent or present.” *Id.*

C. In Enacting RCW 66.44.200, the Legislature Did Not Intend “Sell” to Include “Physical Possession”.

As recognized by the Respondent, a statute’s plain meaning should be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). When enacting liquor laws, the legislature consistently distinguished between the “penal laws of this state relating to the manufacture, importation, transportation, possess, distribution, and sale of liquor.” RCW 66.44.010(2). As elucidated by the statutes excerpted in **Appendix A**, the legislature used the six distinct concepts when addressing the duties of consumers, licensees, and others in the liquor industry. The legislature knows how to draft limits on possession. For example, RCW 66.44.120(1) prohibits the “possession” of any official liquor seal, unless it is attached to a package purchased from the liquor store. The legislature has distinguished “possession” from “sale” in its liquor statutes: RCW 66.44.140 prohibits the “sale” of any spirituous liquor without a government stamp or seal. It also

prohibits the “possession” of “any mash capable of being distilled into spirituous liquor”.

The legislature knows what to say when it wants to require a person to prevent consumption of liquor by another:

- People who carry passengers for hire cannot “knowingly permit any person to drink any intoxicating liquor in any public conveyance.” RCW 66.44.240;
- If you open a club or a public place, you shall not “permit the drinking of any liquor in any such place, unless the sale of liquor in said place is authorized by virtue of a valid and subsisting license.” 66.24.481;

And in the statutes dealing with minors, the legislature has demonstrated that the concepts of sale, consumption, and possession are quite distinct from one another:

- “It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years. . . .” RCW 66.44.270(1);
- It is unlawful for any person to “permit any person under that age to consume liquor on his or her premises or on any premises under his or her control.” RCW 66.44.270(1);

- It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor.” RCW 66.44.270(2)(a).

The legislature has also separately defined “consume”: “‘Consume’ includes the putting of liquor to any use, whether by drinking or otherwise.” RCW 66.04.010(10). If, as the Board maintains “sell” includes “consume,” the legislature would not have given them differing definitions.

If the legislature intended to impose a duty on licensees to prevent the possession or consumption of liquor by apparently intoxicated persons, if intended to impose a criminal penalty, it would know what to say, and would say it clearly and unambiguously: “It is unlawful for any licensee to permit an apparently intoxicated person to possess or consume liquor on its premises.” The legislature has not imposed such a duty on a licensee.

However, the legislature clearly distinguishes between “sale” and “consumption” again, in RCW 66.44.200 itself. RCW 66.44.200(1) states “No person shall *sell* any liquor to any person

apparently under the influence of liquor” (emphasis added). The next section, 66.44.200(2)(a) provides “No person who is apparently under the influence of liquor may *purchase* or consume liquor on any premises licensed by the Board, and that “a violation of this subsection is punishable by a fine of not more than five hundred dollars.” The third section provides “an administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.”

Clearly, from both the plain language and all of the other statutes distinguishing between the terms, the state legislature intended “purchase” and “sale” to involve contractual privity between the person “selling” and the person “purchasing” apparently under the influence, for both sale and purchase give rise to separate actions. Both require a legal transaction. Additionally, though, an apparently intoxicated person also commits an infraction for *consumption*, which implicitly acknowledges that there are potential

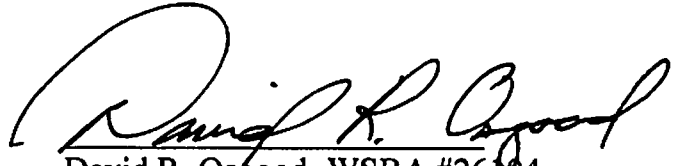
means of obtaining liquor outside of the avenue of sale and purchase.

IV. CONCLUSION

The legislative history and the plain words used in RCW 66.44.200 demonstrate that Washington's legislature sought to foster personal accountability on the part of individuals who drink alcohol, and limit the liability of licensees to situations where actual sale or service to an apparently intoxicated person can be established. Except for a requirement that they post signs, the legislature's latest amendments did not increase the responsibilities of liquor *licensees*.

But the Liquor Control Board relies on a rule that imposes a duty on licensees considered by the legislature, but not enunciated in the statute. Because the rule is contrary to and superseded by a more specific statutory provision, and because the prior statutory authority and case law interpreting it does not grant the Board the authority it had claimed, the Board's rule should be deemed a nullity. Plaintiff respectfully requests that the Court issue a declaratory ruling permanently enjoining enforcement of WAC 314-16-150.

DATED this 11th day of March, 2012.



David R. Osgood, WSBA #26104
Law Office of David Osgood, P.S.
Attorney for Appellant Linsky,
Inc.

CERTIFICATE OF SERVICE

DAVID R. OSGOOD, does declare, under penalty of perjury under the Laws of the State of Washington and the United States, that on January 3, 2012, I served upon Mr. Gordon Karg, Assistant Attorney General for the State of Washington, counsel for Respondent WASHINGTON STATE LIQUOR CONTROL BOARD a copy of

APPELLANT'S REPLY BRIEF

by electronic copy and U.S. Mail, postage pre-paid.

DATED at SEATTLE, WASHINGTON this 11th day of March, 2012.



David R. Osgood

Appendix A –Current Liquor Statutes (emphasis supplied)

RCW 66.04.010 Definitions

In this title, unless the context otherwise requires:

...

(10) "Consume" includes the putting of liquor to any use, whether by drinking or otherwise.

...

(38) "Sale" and "sell" include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person; and also include a sale or selling within the state to a foreign consignee or his agent in the state. "Sale" and "sell" shall not include the giving, at no charge, of a reasonable amount of liquor by a person not licensed by the board to a person not licensed by the board, for personal use only. "Sale" and "sell" also does not include a raffle authorized under RCW 9.46.0315: PROVIDED, That the nonprofit organization conducting the raffle has obtained the appropriate permit from the board.

...

RCW 66.24.481. Public place or club — License or permit required — Penalty.

No public place or club, or agent, servant or employee thereof, shall keep or allow to be kept, either by itself, its agent, servant or employee, or any other person, any liquor in any place maintained or conducted by such public place or club, **nor shall it permit the drinking of any liquor in any such place**, unless the sale of liquor in said place is authorized by virtue of a valid and subsisting license issued by the Washington state liquor control board, or the consumption of liquor in said place is authorized by a special banquet permit issued by said board. Every person who violates any provision of this section shall be guilty of a gross misdemeanor.

RCW 66.44.010. Local officers to enforce law — Authority of board — Liquor enforcement officers.

(2) In addition to any and all other powers granted, the board shall have the power to enforce the penal provisions of this title and the penal laws of this state relating to the **manufacture, importation, transportation, possession, distribution and sale of liquor.**

RCW 66.44.120. Unlawful use of seal.

(1) No person other than an employee of the board shall keep or have in his or her possession any official seal prescribed under this title, unless the same is attached to a package which has been purchased from a liquor store or contract liquor store; nor shall any person keep or have in his or her possession any design in imitation of any official seal prescribed under this title, or calculated to deceive by its resemblance thereto, or any paper upon which any design in imitation thereof, or calculated to deceive as aforesaid, is stamped, engraved, lithographed, printed, or otherwise marked.

RCW 66.44.100. Opening or consuming liquor in public place — Penalty.

Except as permitted by this title, no person shall open the package containing liquor or consume liquor in a public place. Every person who violates any provision of this section shall be guilty of a class 3 civil infraction under chapter 7.80 RCW.

RCW 66.44.140. Unlawful sale, transportation of spirituous liquor without stamp or seal — Unlawful operation, possession of still or mash.

Every person who shall sell or offer for sale, or transport in any manner, any spirituous liquor, without government stamp or seal attached thereto, or who shall operate without a license, any still or other device for the production of spirituous liquor, or shall have in his possession or under his control any mash capable of being distilled into spirituous liquor except as provided in RCW 66.12.130, shall be guilty of a gross misdemeanor and upon conviction thereof shall upon his first conviction be fined not less than five hundred dollars and confined in the county jail not less than six months, and upon second and subsequent conviction shall be fined not less than one thousand dollars and confined in the county jail not less than one year.

RCW 66.44.160. Illegal possession, transportation of alcoholic beverages.

Except as otherwise provided in this title, any person who has or keeps or transports alcoholic beverages other than those purchased from the board, a state liquor store, or some person authorized by the board to sell them, shall be guilty of a violation of this title.

RCW 66.44.170. Illegal possession of liquor with intent to sell — Prima facie evidence, what is.

Any person who keeps or possesses liquor upon his person or in any place, or on premises conducted or maintained by him as principal or agent with the intent to sell it contrary to provisions of this title, shall be guilty of a violation of this title. The possession of liquor by the principal or agent on premises conducted or maintained, under federal authority, as a retail dealer in liquors, shall be prima facie evidence of the intent to sell liquor.

RCW 66.44.200. Sales to persons apparently under the influence of liquor — Purchases or consumption by persons apparently under the influence of liquor on licensed premises — Penalty — Notice — Separation of actions.

(1) No person shall sell any liquor to any person apparently under the influence of liquor.

(2)(a) No person who is apparently under the influence of liquor may purchase or consume liquor on any premises licensed by the board.

(b) A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.

(c) A defendant's intoxication may not be used as a defense in an action under this subsection.

(d) Until July 1, 2000, every establishment licensed under RCW 66.24.330 or 66.24.420 shall conspicuously post in the establishment notice of the prohibition against the purchase or consumption of liquor under this subsection.

(3) An administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.

RCW 66.44.210. Obtaining liquor for ineligible person.

Except in the case of liquor administered by a physician or dentist or sold upon a prescription in accordance with the provisions of this title, **no person shall procure or supply, or assist directly or indirectly in procuring or supplying, liquor** for or to anyone whose permit is suspended or has been canceled.

RCW 66.44.240. Drinking in public conveyance — Penalty against carrier — Exception.

Every person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant, or employee of such person, **who knowingly permits any person to drink any intoxicating liquor in any public conveyance**, except in the compartment where such liquor is sold or served under the authority of a license lawfully issued, is guilty of a misdemeanor. This section does not apply to a public conveyance that is commercially chartered for group use or a for-hire vehicle licensed under city, county, or state law.

RCW 66.44.250. Drinking in public conveyance — Penalty against individual — Restricted application.

Every person who drinks any intoxicating liquor in any public conveyance, except in a compartment or place where sold or served under the authority of a license lawfully issued, is guilty of a misdemeanor. With respect to a public conveyance that is commercially chartered for group use and with respect to a for-hire vehicle licensed under city, county, or state law, this section applies only to the driver of the vehicle.

RCW 66.44.270. Furnishing liquor to minors — Possession, use — Penalties — Exhibition of effects — Exceptions.

(1) It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

(2)(a) It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20RCW.

(b) It is unlawful for a person under the age of twenty-one years to be in a public place, or to be in a motor vehicle in a public place, while exhibiting the effects of having consumed liquor. For purposes of this subsection, exhibiting the effects of having consumed liquor means that a person has the odor of liquor on his or her breath and either: (i) Is in possession of or close proximity to a container that has or recently had liquor in it; or (ii) by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibits that he or she is under the influence of liquor. This subsection (2)(b) does not apply if the person is in the presence of a parent or guardian or has consumed or is consuming liquor under circumstances described in subsection (4) or (5) of this section.